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No. 07-740

In The Supreme Court of the United States

DEVIN DANIELS, BRYCE CLEMENTS, DAIMON FULLERTON, NICOLE MURROW, AND MAREN SANDLER, CLASS REPRESENTATIVES,

Petitioners,

v.

PHILIP MORRIS INC., R.J. REYNOLDS TOBACCO CO., LORILLARD TOBACCO CO., AND BROWN & WILLIAMSON TOBACCO CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Interest of *Amici Curiae* Center for Public Interest Law (CPIL) and Children's Advocacy Institute (CAI)[1]

The Center for Public Interest Law (CPIL) is an academic center based at the University of San Diego (USD) School of Law. CPIL trains students in the practice of public interest law and operates a statewide law firm representing consumer interests before the regulatory agencies of California. The Children's Advocacy Institute (CAI) is a sister academic center at the USD School of Law focusing on the health and safety of California's children. The decision below implicates central concerns of both organizations.

CPIL has had a longstanding interest in the California Unfair Competition Law (UCL, at California Business and Professions Code § 17200 *et seq.*) here at issue: CPIL has trained students in its provisions since 1980. It has also been involved in the California Law Revision Commission's deliberations on reform of the statute in the late 1990s. It has filed suit under its terms as part of its public interest litigation.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record received timely notice of *amici* CPIL and CAI's intent to file this brief, and the parties have consented to the filing of this *amici curiae* brief. Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amici* CPIL and CAI state that this brief was not written in whole or in part by counsel for a party, and no other individual or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

The instant case also affects child protection issues, since it would foreclose state consumer protection even where child health is implicated under a misplaced commercial speech rationale. Since 1990, the Children's Advocacy Institute has worked to protect child health and safety in California, sponsoring legislation and litigating over the last decade pertaining to health and safety across a spectrum of issues (from playground and swimming pool safety to the "Kids' Plates" custom license plate statute funding poison control centers and other child protection funds. CAI's formal course at the University of San Diego School of Law is *Child Rights and Remedies,* the text of which includes substantial coverage of the U.S. Supreme Court decision in *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001) here at issue. The California Supreme Court's interpretation of *Lorillard* to categorically bar application of state unfair competition law raises serious questions of law and policy central to the longstanding work of the Center for Public Interest Law. And because the decision below denies state remedy for inherently misleading and harmful advertising to children, is also important to CPIL's sister organization, the Children's Advocacy Institute. Accordingly, these two organizations, whose interests coalesce in the petition now before this Court, respectfully pray that their arguments in support of the grant of *writ of certiorari* be considered.

II. Summary of Argument

In the decision below (*In Re Tobacco Cases II*, 41 Cal. 4th 1257, 163 P.3d 106, 63 Cal. Rptr. 3d 418 (2007), hereinafter referred to as *Daniels*), the California Supreme Court dismissed a class action complaint alleging the deliberate targeting of children for the marketing and sale of cigarettes in violation of the state's Unfair Competition Law. The court's stated basis for its dismissal is this Court's holding in *Lorillard Tobacco Company v. Reilly,* 533 U.S. 525 (2001). Specifically, the court below held that the Federal Cigarette Labeling and Advertising Act concerning health and safety advertising preempts California's Unfair Competition Law because health and safety considerations underlie protection of sales to minors and hence, such marketing is subject to exclusive federal control under the statute. And the decision also holds that the advertising of tobacco is subject to commercial speech protection shielding it from the allegations.

Amici curiae CPIL and CAI contend that the commercial speech rights of tobacco outlined in *Lorillard* did not reach deceptive practices, nor sale to minor limitations. *Lorillard* rejects broad limitations on placement of accurate advertisements of a lawful product where those state restrictions are not narrowly tailored to a compelling state interest. The case turned on the lack of nexus between billboard and sign placement and child tobacco usage. The instant *Daniels* case alleges direct, successful marketing to children and addresses precise practices with the

intent and effect of accomplishing such sales (and addiction enhancement). The nexus as alleged is direct and is connected to an acknowledged compelling state interest, and to an unlawful business practice.

Amici contend that: (a) the rationale behind tobacco sale-to-children prohibition extends beyond the health and safety ambit of the Federal Labeling Act, and reflects a major public policy disfavoring purchases of an addictive product – separate and apart from health consequences; (b) the Federal Labeling Act's terms and legislative history extend only to health and safety representations, while the *Daniels* allegations go to the very different marketing practice of selling an addictive product to children – a practice properly subject to fair competition regulation with or without any health consequence; (c) the fact of cigarette health and safety problems does not moot or subtract from a host of other reasons to limit sales to minors; (d) the decision below transforms the deficit of health and safety threat into a perverse rationale for industry unfair competition immunity; (e) the rationale of the court would logically moot all sale-to-minor prohibitions as "at bottom" health and safety regulation cancelled by the Federal Labeling Act; and (f) the *Lorillard* decision did not mandate federal preemption of sale-to-minors (or addictive substance sale) state regulation.

Finally, CPIL and CAI argue that review of the decision below is commended by: (a) the importance of tobacco marketing of an addictive product and of

sales to minors – including the high national sales volume of the product and its addictive nature; (b) the national implications of mooting unfair competition statutes effective in all 50 states over a broad reach of tobacco industry marketing; (c) the removal of authority for unfair competition enforcement by both private and public (DAs, AG) actions; (d) the necessary implication underlying the decision below that preemption applies not only to marketing of health claims, but also to sales restrictions to minors; (e) the conflict between the First Circuit's *Good v. Atria Group Home, Inc.*, 501 F.3d 29 (1st Cir. 2007) decision allowing suit over "light" cigarette advertising (which *does* involve primarily health and safety representations) involved; and (f) the gross error of the decision below in its application of this Court's own *Lorillard* decision – warranting correction by the misinterpreted source.

III. Commercial Speech Considerations in *Lorillard* (or Elsewhere) Do Not Preclude State Remedies for the Solicitation of Children into Tobacco Addiction

The *Lorillard* decision of this Court acknowledged the commercial speech rights of the tobacco industry (or any other business engaged in the sale of a lawful product). But it also interposed the usual limitations on such advertising. Petitioners argue that the balancing test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) does not apply first amendment protection to

tobacco industry marketing to minors. But one does not have to look to any kind of refined balancing test to reach the conclusion of petitioners. As *Lorillard* itself emphasizes, commercial speech rights do not insulate untruthful ads from liability. Misleading ads are categorically without commercial speech protection. And beyond the truth requirement, the states may restrict such speech under a strict scrutiny analysis where there is a "compelling state interest." *Lorillard* recognizes that sales to minors are such a state interest. The primary objection to the Massachusetts restrictions struck in *Lorillard* involve the failure of the state to adequately tailor its prescriptive rules to that compelling interest. Hence, Justice O'Connor noted that prohibiting advertisements in stores below 5 or 6 feet from the ground would not be adequately connected to child protection. The Justice noted the lack of evidence that children see at their own level any more persuasively than they see a sign placed at a higher level. Although CPIL and CAI respectively contend that a proper factual predicate could and should have been produced to provide the needed nexus, the Court held that the record in the case was deficient in such a necessary showing. The judgement rested on the conclusion that evidence failed to establish such a connection – not that state regulation was categorically barred. Similarly, the Court found a lack of nexus between the ban on billboards in locations where more children may see them and the discouragement of child smoking. The restriction was overly broad and not sufficiently

tailored to the interest acknowledged by the Court to be qualifiedly compelling.

The *Daniels* class plaintiff is not purporting to impose categorical prophylactic restrictions on advertising. It is alleging a deliberate advertising campaign to target children. It is directed at the cessation of those specific practices. It must prove the connection to child marketing impact. It does not raise the questions that led to the reversal of the general and broadly applied restrictions struck in *Lorillard*.

IV. The *Daniels* Decision Below Disrespects State Prerogative and Federalism Precedents

The Federal Cigarette Labeling and Advertising Act (hereafter "Federal Labeling Act") provides that "no requirement or prohibition *based on smoking and health* shall be imposed under State law with respect to the advertising or promotion of any cigarettes the package of which are labeled in conformity with the provisions of this chapter" (emphasis added) 15 U.S.C. § 1334(b). The decision below seizes upon this instruction to bar state unfair competition limitation of tobacco advertising practices beyond health debilitation.

The brief of petitioners herein focuses on *Cipollone v. Leggett Group Inc.*, 505 U.S. 504 (1992), which held that the Federal Labeling Act does not preempt state unfair competition enforcement, and cites *Good v. Atria Group Home, Inc.*, 501 F.3d 29 (1st Cir. 2007) decision of the First Circuit which also found no

preemption. The petitioners argue that the "light" cigarette (allegedly safer) advertising of tobacco companies in *Good* was misleading and hence violative of the Maine unfair competition laws there at issue. The point made is that a federal health and safety directive does not extend to affirmatively misleading advertising (petitioners' brief at 18-22).

Petitioners also argue that the Federal Labeling Act expressly left FTC jurisdiction over deceptive ads intact and that, because state unfair competition statutes are "parallel" to that FTC jurisdiction, they are not pre-empted.

The argument of petitioners has merit, but it seriously understates the error of the California Supreme Court in the decision below, which relies largely on *Lorillard's* line:

> "At bottom, that concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected" (*Lorillard*, 533 U.S. 525 at 548, quoted in *Daniels*, 41 Cal.4th 1257 at 1270 to 1272).

But the *Daniels* decision fails to acknowledge that the *Lorillard* holding *en toto* hardly challenged the authority of the states to regulate tobacco sales to minors. Retailers cannot sell to youth under 18 years of age in any of the several states under statutes enacted in all of them. Presumably, the Federal

Labeling Act does not preclude unfair competition enforcement to limit sales to minors. One dilemma posed by the *Daniels* court is: How can the statute bar a deliberate marketing campaign to target minors for sale of an addictive product.... presumably because that effort is "at bottom" driven by health and safety concern (as *Daniels* concludes), and by the same line of logic not also bar the more categorical state restrictions on child sales? If the specific effort to solicit children – precisely proven and with specific rifle-shot remedies proposed to stop must fall to a distantly related federal statute commanding package warnings about health, than the general prophylactic prohibition by an age category – also based on the very same stated health and safety concerns – would appear to be exempt *a fortiori*. What is the point of distinction here that cuts in favor of upholding a gross limitation on sales to 17 year olds buttressed by criminal sanctions as within the state ken, while applying federal exclusive prerogative to bar enforcement of fair competition standards applied to a specific set of tactics that are intended and effectuate addictive sales to minors ? It is the same population, addressed for the same public policy rationale. Respondents are properly asked where the line is drawn to maintain any state limitation on underage smoking sales under the *Daniels* logic and holding below.

At least in *Good*, tobacco could argue that the light cigarette ads challenged by plaintiffs really pertained to health and safety claims and that the

underlying issue was whether light cigarettes are more or less hazardous. The First Circuit in *Good* upheld the parallel jurisdiction of Maine's unfair competition law. But here the case is easier for petitioners and much more attenuated for tobacco. Here we are talking not about health and safety advertising at all – but about the sale of an *addictive* product to minors. Imagine, *arguendo*, that a small rogue tobacco firm based in El Centro, California, injects its cigarettes with amphetamine derivative for strong addictive effect, and then sweetens the tobacco and filter tips – deliberately to appeal to teen consumers. And imagine that it is a relatively safe cigarette, sans tar and other carcinogens. The purpose of the rogue marketing scheme is to create a customer base who become addicted to their product, marketed to them as teens and with the addictive effect unmentioned in ads or marketing. But the *Daniels* holding applies the labeling and advertising provision quoted above as the source of federal immunity to bar a state from stopping or interfering with such marketing. Nor is the El Centro rogue addiction-hyping-youth-marketing hypothetical irrelevant – it is essentially what the class in *Daniels* contends the respondents have done with their more dangerous product composition.

The legislative history of the Federal Labeling Act is not mysterious. The Congress found that the emphysema, respiratory, carcinogenic and other health effects of its product properly trigger a specified package ad "warning" message as to health

effects. And the statute prohibited television promotion of the product given its health impact. Nothing in that statute or its history has anything to do with other – non-safety – business practices of tobacco. (*See* Congressional findings and intent stated at 15 U.S.C. § 1331 for the underlying findings and intent of the Congress in the Federal Labeling Act Enactment). If tobacco companies fail to pay taxes as required by state law, or defraud consumers, or bait and switch as to pricing, or charge usurious interest, or engage in child marketing of an addictive product as alleged in the instant *Daniels* case – state law properly applies.

As the *Daniels* decision below emphasizes repeatedly (and essentially relies upon), health and safety is relevant to the ban on minor purchase of tobacco. Both politically, and in terms of public health policy, we do not want minors to ingest a product that will cause their premature death. But that underlying concern, while the sole predicate of the Federal Labeling Act, is not the sole concern of child or consumer advocates. And neither *Lorillard* nor the *Daniels* case below even address another primary concern: The addictive quality of the product. Nicotine is not addictive in the sense that chocolate or fast cars or golf may be addictive. It is physiologically addictive to a degree perhaps unmatched by any substance outside of methamphetamine – beyond the power of most illicit drugs. *See* National Institute on Drug Abuse (NIDA) Reports at http://www.nida.nih.gov/researchreports/nicotine/nicotine.html. The most

recent reports pertinent to the power of addiction and the prevalence and costs of youth addiction in particular include the following studies published within the last ten years by NIDA, and available for review at the web site *supra*:

(a) Art Card: **Nicotine** – An Addictive Drug (Addictive Drug Inventory Number: NIDACRD11).[2]

(b) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004), FACT SHEET, Health Professionals; Parents/Caregivers; Prevention Program Planners; Students.[3]

(c) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004) Inventory Number: NIF010 1999 NIDA.[4] googlesearch.aspx?q=cache:v3_cpeWHRk4J http://ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx%3FItemID%3D15196+nicotine&btnG=S.

(d) Mind Over Matter: The Brain's Response to **Nicotine** Inventory Number: PHD807 (explains scientifically how **nicotine** affects the entire body).[5]

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[2] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15803.

[3] ncadistore.samhsa.gov/CatalogNIDA/Pub_List.aspx?CID=1&KID=55.

[4] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15196.

[5] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=17678.

(e) NIDA InfoFacts: Cigarettes and Other **Nicotine** Products (March 2004), FACT SHEET, Health Professionals; Parents/Caregivers; Prevention Program Planners; Students.[6]

(f) NIDA Research Report Series: Tobacco Addiction (describes what **nicotine** is, presents current epidemiological research data regarding its use, and reports on the medical consequences of **nicotine** use).[7]

(g) Publications By Drugs of Abuse (Barbiturates, Methadone, Buprenorphine, Methamphetamines. Club Drugs, Nicotine, Cocaine, Nitrous Oxide, Crack Cocaine, Opiates/Narcotics, Depressants, OxyContin, et al.).[8]

(h) National Institute on Drug Abuse, NIDA Research Report Series: Tobacco Addiction.[9]

A mature adult may make a decision to subject himself or herself to future physiologically driven purchases, but such decision with such lifelong purchasing consequences are best not made at the age of 14. And this judgement may drive a defensible state

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[6] ncaistore.samhsa.gov/CatalogNIDA/Pub_List.aspx?CID=1&KID=9.

[7] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15263.

[8] ncadistore.samhsa.gov/CatalogNIDA/Search_Topics.aspx?CID=1.

[9] ncadistore.samhsa.gov/CatalogNIDA/Pub_Details.aspx?ItemID=15441.

policy without any health and safety implications at all. *Amici* CPIL and CAI respectfully suggest that the adverse health and safety effects are not needed to warrant state restriction of sales to minors. Many examples illustrate market rule distinctions between children and adults. A typical example is the now common prohibition on tattooing minors without parental permission. That restriction is increasingly imposed not primarily because of health concerns, but because they are difficult to remove. Some youth may not be prescient enough to avoid implanting her current boy friend's name. The point is that it is too often a decision made too early and lasting too long. Teen pregnancy reduction is perhaps a more serious example of a similar state interest. The protection of our youth from their own hormonal improvidence is a legitimate state function – it may or may not have health and safety focus – and any expansion of federal territory based on bright line pronouncements that "sales to minors are driven by health and safety concern" is imprudent. Moreover, it appears to be based on a *non sequitur* implication that since health is such an admittedly important factor, it is appropriately (a) expanded beyond its direct domain to foreclose other legitimate societal concerns over children and market sales, and (b) applied to categorically bar the assurance of fair competition across the broad subject matter of tobacco marketing practice, including a gross bar to the pre-eminent safekeepers of fair competition in the nation (state law remedies under UCL's within the several states).

The existence of harmful health impact here appears to mischievously favor industry license as to broader aspects of its marketing and other effects. The implicit logic is: "Yes, there are other reasons for state restriction of sales of this addictive product to minors, but the health hazards are so ominous that we shall deny the existence of any other aspect, and thus demonstrate our sensitivity to its deleterious nature." The result of this dynamic is to impose federal preemption of state consumer protection laws as to any aspect of tobacco sales touched by health issues – with the *Daniels* court finding such health consequence to be pervasively "underlying" all sorts of policies, including the protection of minors. Perversely, a sword of proper condemnation and concern becomes a magic shield of immunity. And that immunity extends beyond the scope of the Federal Labeling Act's intended or actual protection. The fact of a powerful rationale for public regulation does not remove less urgent but still compelling secondary justifications involving other qualities and effects.

Nothing in the *Lorillard* decision of this Court indicates that the statute's reach properly goes beyond its terms and history as discussed above. However, the logic of the court below would extend this Court's *Lorillard* precedent far beyond its carefully considered tether. A failure to correct this erroneous state supreme court interpretation will preclude state fair competition standards quite beyond the health ambit of the required "determined to be hazardous" warning or health and safety representations in

general. The issues of addictive quality (and deliberately enhanced addictive quality) and marketing to children are – individually and together – another issue. It is an issue with some health related implications, but it is not entirely an issue of health given factors of age (maturity) and chemically arranged lifelong purchase compulsion. The *Daniels* case erases state jurisdiction well beyond the health and safety reach of the Federal Labeling Act. *Amici* CPIL and CAI respectfully argue that this child/consumer protection territory is a matter of proper state concern.

To restate *Amici's* point: Assume that the products addressed by the instant *Daniels* case have no adverse health consequences whatever – and that even the label required by the Federal Labeling Act is gratuitous and properly inapplicable. It is relevant that consumers are being sold a product with a physiologically addictive quality, and that a competitor able to enhance that addictive quality will gain an advantage in the marketplace. And youth who can be hooked constitute a vulnerable population for such addiction-based future purchases. *Amici* can find nothing in the legislative history of the Federal Labeling Act at issue addressing sales to minors and addiction danger. The warning has to do with prescribed safety danger warnings to smokers. If one finds preemption of a state unfair competition law that addresses a competitor allegedly marketing to minors and attempting to stimulate demand for such unlawful sales, does the preemption also not lie as to

the underlying age prohibition. Assuming this Court views those under-age prohibitions as within state police power domain, how do we preempt a marketing campaign with the alleged design and effect of undermining that prohibition?

Nothing in the Federal Labeling Act or its legislative history indicates that it extends beyond its stated reach and provides effective immunity for this industry from any and all of the fifty states, their legislatures, and their courts. We can find no nexus between the stated basis for this bar and its reach as formulated in the *Daniels* decision below. The holding that converts a federal statute intended to create a uniform health hazard warning into a blanket bar to state legislatures and courts asked to address tobacco practices far beyond that ambit has uncertain boundaries. It disrespects state prerogative in assuring fair competition, the control of addictive products (whatever the health effects in later years), and the protection of children. There are reasons to control or prohibit sales directed at children quite apart from the health hazard issue.

These are important questions for this Court to address. For if a circumscribed federal statute can be so extended to grant industry supersession over the reach of the sovereign states as they seek to protect their citizens (here, their children) from addictive products and competitive advantage flowing from addiction enhancement and targeted advertising, the precedential implications are disturbing. Those

implications do not square with this Court's consistent pronouncements respecting such sovereignty.

V. Review is Commended by the Importance of the Issue Presented, Its Reach, and Conflict Where this Court's Own Precedent is at Issue

This Court necessarily chooses sparingly in its grants of *certiorari*. Such consideration is traditionally affected by the importance of the questions raised, their reach, and the need for confusion amelioration. All three factors are present in large measure in the *Daniels* petition here presented.

First, even were we to disregard the significant health implications of tobacco use, its physiologically addictive property makes its sale and promotion of special consequence to the public. Critically, the Federal Labeling Act did not address addiction issues at all. They became pre-eminent in the literature and politics of the subject after the rise of the health and safety argument against tobacco use. The addictive attraction of the product for minors (where peer pressure, rebellion and a desire to appear older may affect purchase and use) is historically documented. The typical smoker is addicted prior to reaching the age of 18.[10]

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[10] *See* On the Measurement of Nicotine Dependence in Adolescence: Comparisons of the FTQ and a DSMIVBased Scale, Denise Kandel, Ph.D, Christine Schaffran, MA, Pamela Griesler,

(Continued on following page)

And the incidence of addiction and volume of sales is momentous, involving millions of adult and youth consumers presently afflicted. The size of this industry, its volume, its numbers of customers under compulsion to purchase regardless of health and safety effect is extraordinary within the American economy. This Court cannot avoid judicial notice of the size of this market, or the unusual source of continuing demand for its product. Convenience store sales alone in 2005 passed $9 billion in the United States.[11]

Second, the question here raised is national in scope. Every state has an unfair competition law. These statutes, sometimes called "Little FTC Acts," are the nation's primary mechanism to assure a free, competitive and fair system of commerce – particularly as to issues of advertising and marketing. The Federal Trade Commission itself operates to enforce its consumer protection Section 5 (15 U.S.C. § 45) with limited powers (primarily the issuance of cease and desist orders and trade regulation guides lacking any financial penalty until fully adjudicated). Its statute lacks any private or ancillary enforcement

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Ph.D, Jessica Samuolis, Ph.D, Mark Davies, MPH, and Rosaria Galanti, M.D., Ph.D, JOURNAL OF PEDIATRIC PSYCHOLOGY (June 2005) 30(4): pages 319-332, excerpted at http://whyquit.com/whyquit/LinksAAddiction.html.

[11] *See* the United States Convenience Store Association statistics and web site's (NPN Web), compiling 2004 and 2005 cigarette sales data, at http://npnweb.com/uploads/researchdata/2006/ConvenienceStoreData/0606_ccss.asp.

means. The Commission is the only progenitor of its cases (outside of antitrust matters). *See Holloway v. Bristol-Meyers Corporation*, 485 F.2d 986 (D.C. Cir. 1973).

Much marketplace policing in the United States is accomplished through the unfair competition laws enacted by and enforced within and among the fifty states. These statutes commonly provide for equitable remedies – including restitution and correction – and often for civil penalties or other deterrent impact directly. Moreover, they often provide for enforcement through both private and public action (*see, e.g.*, California Business and Professions Code §§ 17203-17206). Significantly, the *Daniels* precedent here at issue strips not only the private enforcers of this statute from serving as a check on tobacco industry practices, but also eliminates the important enforcement function of public agencies and offices in their enforcement. In California, 58 district attorneys, major city attorneys, the Department of Consumer Affairs, and the State Attorney General are all assigned the task of unfair competition law enforcement (California Business and Professions Code § 17206). That enforcement is coordinated within the state through an Attorney General sponsored system of notice.

All of the mechanisms for state unfair and unlawful competition enforcement are eliminated from tobacco industry reach by the decision below. They are purportedly preempted by three propositions there advanced: (a) the Federal Labeling Act

occupies the field and preempts state unfair competition enforcement where the Act applies, (b) it applies to tobacco health and safety issues, and (c) the product presents such pervasive health danger that this issue underlies all regulation of tobacco – including even sales to minors. Ergo, the *Daniels* logic infers, federal law preempts tobacco industry marketing limitation in broad measure (largely because it is such a harmful product and hence would presumably always raise the Federal Labeling Act exclusivity). It is fair to ask how the Attorney General of California can enforce the existing tobacco Master Settlement Agreement (MSA) to police industry child marketing, as it has been purporting to do in California over the past decade? Those efforts appear to be darkened by the *Daniels* brush. If the *Daniels* class is foreclosed, public prosecutors acting under the aegis of the same state statute would also be precluded from fair competition protection – under the apparent guise that because tobacco involves health and safety issues, it receives a free pass as to the entire range of marketing abuses it may commit.

A more basic question looms behind the *Daniels* decision: If the Federal Labeling Act truly preempts as to tobacco health and safety issues, and if health and safety necessarily and critically "underlie" the state policy against sales to minors (as this case explicitly states), than how do states have the authority to regulate sales to minors at any level? It would appear that any state that categorically lacks the power to address youth marketing would also not

have the right to prosecute a merchant for making a sale to a 16-year-old. We cannot find the logical line between targeted marketing to youth and a sales prohibition, particularly where the latter is buttressed by criminal sanctions that would make state interference more – not less – problematical. Add to this stew the line of cases finding state laws allowing medicinal marijuana to be preempted by federal drug laws, *see Gonzales v. Raich,* 545 U.S. 1 (2005). One can of course distinguish those cases as involving very specific federal criminal prohibitions by precise and enumerated drug description. In contrast, the addictive quality of tobacco, and state child protection interests (separately or in combination) distinguish it from a federal tobacco labeling statute. But once you posit the proposition that *this* is not the bright line, but that it rather is a divisor between targeted marketing to minors (pre-empted) and sales to minors (not pre-empted) – a problem arises.

Third, we have confusion of traditional concern for this Court. As discussed above, the First Circuit's decision in *Good* is contrary to the *Daniels* result on a rather *in extremis* level. For it deals with an issue relatively more confined to health and safety (are light cigarettes more or less hazardous than regulars and nevertheless being marketed deceptively as to health consequence?). That focus contrasts with the dominant issue of *Daniels* – involving immaturity in purchase decisions and addictive impact. The latter extends well beyond health consequences more than the direct health marketing issue of *Good.* So we not

only have conflict between major regions of the country, but we have an apparent irreconcilable conflict as to policy and state prerogative. They cannot both be right.

The importance of the confusion may be accentuated here by the role of this Court's decision in *Lorillard* at the center of the conflict and the *Daniels* court's reliance on that decision as its major authority. Where the conflict is over a prospective issue or over a matter that has not been considered by the U.S. Supreme Court, it may present a theoretical issue of interpretation. But this case presents what must be (by one of these authorities) a *mis*interpretation of an existing and recent decision of some momentous impact. Arguably, the obligation of this Court to secure the consistent and correct application of its own authority may justify higher priority than disagreements over theoretical issues not yet addressed by the Court. Correction of what the Court has already enunciated and intended – and where its pronouncement is being followed erroneously – may be more important than clarifying where there is a present vacuum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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